UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WARDEN WALTER CRAVEN and THE PEOPLE OF THE STATE OF CALIFORNIA, Appellants, vs. ROBERT EDW. WM. COWLING, Appellee.	)	No. 22141

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

Appellee, a California State prisoner, filed an application for a writ of habeas corpus pursuant to Title 28, U.S.C., § 2241(c)(3), seeking his release from Folsom State Prison at Represa, California.

The writ was granted by the United States District Court for the Eastern District of California. A certificate of probable cause to appeal was issued August 11, 1967. This appeal is by the State of California pursuant to the provisions of Title 28, U.S.C., § 2253.

STATEMENT OF THE CASE

In an information filed by the District Attorney of Los Angeles County, appellee Robert Edw. Wm. Cowling and his co-defendants William Henry Hudson and Rose Valentine Harris were jointly charged, along with one George Reece,

with possessing heroin for sale on July 26, 1963, in violation of section 11500.5 of the California Health and Safety Code (CT 1).* The information also charged appellee Cowling with prior conviction of two felonies, attempted burglary, in Michigan in 1956 and 1959 (CT 2).

Appellee and his co-defendants were arraigned (CT 3-3A), and pleaded not guilty (CT 4, 5, 5A). All waived trial by jury (CT 10), after trial by the court, appellee and his co-defendants Hudson and Harris were found guilty, their co-defendant Reece being found not guilty (CT 12).

As to co-defendant Harris, motion for new trial was denied, criminal proceedings were adjourned, and civil proceedings under section 6451 of the California Penal Code instituted with a stay of execution pending appeal granted (CT 17).

Appellee Cowling's motion for new trial was denied, probation was denied, and he was sentenced to State Prison for the term prescribed by law, no findings having been made as to his alleged prior convictions (CT 18).

In the case of co-defendant Hudson, motion for new trial was denied, proceedings were suspended, and he was granted probation for five years (CT 18A). Appellee and his two co-defendants filed notices of appeal from the respective orders (CT 20-21A).

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* "CT" refers to Clerk's Transcript in <u>People</u> v. <u>Cowling</u>, 2 Crim. 9769.

The District Court of Appeal of the State of California, for the Second Appellate District, affirmed the conviction on July 20, 1965, in an unpublished opinion People v. Cowling, Crim. No. 9769. (A true and correct copy of said judgment is attached to the Return to Order to Show Cause, marked Exhibit B.)

On August 25, 1965; a petition for rehearing was denied, and on September 29, 1965, a petition for hearing in the California Supreme Court was denied. Certiorari was sought from the United States Supreme Court in Cowling v. California, 1060 Misc., October Term 1965. That petition was denied on June 20, 1966 (Cowling v. California, 86 S.Ct. 1959).

On January 24, 1967, a petition for writ of habeas corpus was filed by appellee with the United States District Court for the Eastern District of California, No. Civ. S-185 on the files of said Court. An order to show cause was issued. On March 10, 1967, a return to order to show cause and motion to dismiss was filed. On July 20, 1967, the memorandum and order granting the writ was filed. On August 11, 1967, a certificate of probable cause to appeal was issued.

STATEMENT OF FACTS

On July 26, 1963, James Grennan, a Los Angeles police officer assigned to the narcotic division, was conducting an investigation of the premises at 1946 West 25th

Street in Los Angeles (RT 12-13).*

Prior to this time, Officer Grennan had had a conversation with one Robert Sexton, who was known to the officer as a dealer and trafficker in heroin in the Los Angeles area. In the conversation, Officer Grennan discovered a phone number in the possession of Mr. Sexton and the officer learned that appellee's co-defendant Rose Harris lived at the address of the phone number (RT 15-18). Officer Grennan had information that Rose Harris was associated with Sexton and also with one Ted Stanley, whom the officer knew had been arrested for possession of narcotics and whom he knew to be an associate of Sexton. At approximately 4 p.m., on July 26, Officer Grennan received from Sergeant Flynn the substance of a telephone conversation which Sergeant Flynn had had with a confidential informant to the effect that the occupants of 1946 West 25th Street had a large quantity of heroin in their possession which they were packaging for sale (RT 18-19).

Atabout 4:15 on July 26, Officer Grennan went with Sergeants Flynn and Hanks to the address on West 25th Street, where they received from the purported owner of the premises permission to use one of the vacant units as a vantage point to observe activities in the unit at 1946 West 25th Street (RT 18-23). While in the vacant unit, Officer Grennan

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* "RT" refers to Reporter's Transcript in <u>People</u> v. <u>Cowling</u>, 2 Crim. 9769

observed two women enter and leave the suspect's apartment (RT 55). The officers noted the curtain upstairs move when the women went into the apartment (RT 67).

At the request of the officers the owner of the suspect apartment went to its front door on three separate occasions and tried to gain admission. Twice he received no response and the last time he was told to return later (RT 27-29, 68). He was observed from the second story window of the suspect apartment (RT 28).

Another man, co-defendant Reece, approached the suspect apartment and knocked, then stepped back five or six feet from the door (RT 70). Thereupon, an upstairs window at the address was opened and Officer Grennan observed two male Negroes peer out, one of whom, appellee Cowling, was holding a flour sifter (RT 23-24). Flour sifters are used to dilute heroin by mixing it with sugar (RT 24-25).

After the passage of another period of time, appellee Cowling came out the front door of 1946 West 25th Street and walked around the corner of the courts. The officers left their apartment, stopped appellee Cowling, and identified themselves. Officer Grennan observed apparent hypodermic needle marks upon both of Cowling's arms (RT 25-26). After observing Cowling's general appearance and the pupils of his eyes, Officer Grennan came to the conclusion that Cowling was under the influence of a sedative or opiate drug (RT 31, 41). Thereupon, appellee Cowling was placed

under arrest (RT 42). Officer Grennan obtained a key to the residence from a child in the company of appellee who said that appellee's co-defendant Rose Harris was his mother. With this key Officer Grennan opened the door to the residence (RT 42). It was the experience of the officer that it was common practice for those who were in possession of narcotics to attempt to destroy it when threatened with arrest (RT 95). There was a fire escape in the back of the apartment by the window to the room where the narcotics were found (RT 274). Officer Grennan and Sergeant Hanks entered the residence and went upstairs to the room they believed they had had under observation. Officer Grennan opened the door and said, "Police Officers." He and Sergeant Hanks then stepped into the room and observed co-defendants Harris and Hudson. On the bed in the room was a quantity of narcotics paraphernalia including a funnel, strainer, balloon fragments and a razor blade. There was also a quantity of heroin (Peo. Exhs. 1, 2; RT 96-98). Officer Grennan informed co-defendants Harris and Hudson that they were under arrest. A short time later, Sergeant Flynn entered the bedroom with appellee Cowling and co-defendant Reece. Sergeant Grennan asked to whom the stuff in the bedroom belonged and all denied any knowledge of it (RT 99).

Officer Grennan examined appellee and his co-defendants and found hypodermic marks on the arms of co-defendant Harris, but none on the arms of co-defendant Hudson. Appellee

Cowling had numerous marks on his arms (RT 120).

In Officer Grennan's opinion the amount of heroin in People's Exhibit 1 (more than 68 grams) would have a retail value in excess of $8,000 (RT 128). The amount of heroin found by Officer Grennan, along with the utensils simultaneously found, led him to believe that the heroin was being prepared for sale (RT 137).

Another officer went to the locked bathroom door, knocked, and was told to wait a moment. After waiting a few minutes he forced in the door (RT 181). Co-defendant Reece was in the bathroom. In the toilet were a hypodermic needle and an eyedropper. In the sink was a fragment of a blue balloon and a spoon with a darkened bottom (RT 183). This equipment is used in the administration of narcotics (RT 185).

SUMMARY OF ARGUMENT

The police had reasonable and probable cause to enter the suspect apartment to arrest those found therein whom the police reasonably believed were then committing a felony, possession of a narcotic, heroin. Further, the police acted reasonably and legally when they entered without first announcing their presence and intentions. The conduct of those in the apartment, while it was under observation, and the unique arrangement of that abode, plus the knowledge of the fact that those in possession of narcotics can and do try to destroy it when an arrest and seizure is

attempted, reasonably led the police to believe that the seizure would be frustrated if they announced their presence. Indeed, the record proves that this fear was well founded, as when the police finally broke into a locked bathroom, a needle and eyedropper were discovered in the toilet and the fragment of a blue balloon and a spoon with a darkened bottom were in the sink. All of this was narcotic paraphernalia. Further, as the appellee, who was arrested outside of the apartment just prior to the entry, appeared to be under the influence of narcotics, the police could reasonably believe that if an immediate unannounced entry was not effected, those still in the residence might use the narcotics suspected to be therein. Not only would this result in the loss of the evidence, it would injure those who consumed it. Certainly it was not only reasonable, but humane, for the police to act without hesitation to protect the suspects from this degradation and destruction.

ARGUMENT

THE POLICE HAD REASONABLE AND PROBABLE CAUSE TO MAKE THE ENTRY, ARREST, SEARCH AND SEIZURE, AND TO DO SO WITHOUT FORMAL REQUEST FOR ENTRY

At the very outset it should be pointed out that upon direct appeal from his conviction in People v. Cowling (unpublished), the appellee raised the question of the illegality of the search and resulting seizure of heroin. The Appellate Court in passing on this question held as follows:

"Initially, we find no merit in appellant's claim that the contraband was illegally seized because the entry and search which resulted in its discovery were not incidental to a lawful arrest.

"Although the officers had probable cause to arrest each of the defendants including defendant Cowling, the entry and search of the residence was justified as incidental to the arrests of defendants Hudson, Harris and codefendant Reece. Defendants' reliance on cases such as People v. Cruz, 61 Cal.2d 861, which hold that where a defendant was arrested on a public street the search of his house some distance away could not be justified as a lawful incident to his arrest, is clearly misplaced. Here, the entry and search need not be justified as incidental to Cowling's arrest which occurred on the street. The information in the hands of the officers at the time they arrested defendant Cowling gave them probable cause to arrest the persons they knew were still inside the apartment.

"Reviewing this information, the officer's investigation of 1946 West 25th Street had uncovered evidence that defendant Harris, who lived at the address, often associated with narcotics offenders. A surveillance of the residence was begun shortly before the arrests, when the officers received a tip

from an informant, that the occupants of the residence were then in possession of heroin and were in the process of packaging it for sale. This information was corroborated shortly thereafter, when the officers observed Cowling, standing with another person at the upstairs bedroom window, holding a flour sifter, an instrument normally used only in a kitchen, and which the officers knew was often used by those dealing in narcotics to 'cut' heroin. The suspicions of the officers were then further confirmed when they stopped Cowling for questioning after he left the apartment and observed needle marks on his arms and that he appeared to be under the influence of narcotics. On the basis of this information and their knowledge that at least two persons were still inside the house - defendant Reece whom they had seen enter the premises, and another person (defendant Hudson) whom they had observed looking out of the upstairs window along with Cowling when Reece sought admittance - the totality of circumstances presented justified the officers' belief and 'strong suspicion' that these persons were in possession of heroin. The officers thus had probable cause to enter and arrest them. (See People v. Williams, supra, 218 Cal.App.2d 86, 91; People v. Hernandez, 206 Cal.App.2d

253) Noncompliance with the requirements of demand and explanation prior to entry (Penal Code § 844), was justified in order to insure that the contraband would not be destroyed or otherwise disposed of. (People v. Maddox, 46 Cal.2d 301, 306; In re Sterling, 232 Cal.App.2d ____.)"

It is, of course, well established that the lawfulness of an arrest is initially a question of state law (see: United States v. DiRe, 332 U.S. 581; Ker v. State of California, 374 U.S. 23), but it is ultimately a federal question where the constitutionality of the state rule is put into issue (see: Ker v. State of California, supra, at 38).

We submit that the police here had reasonable and probable cause to enter and arrest under both federal and state law.

In the recent decision of the United States Supreme Court in Cooper v. California, __ U.S. __, 17 L.Ed.2d 730, 87 S.Ct. __, the court again reiterated that the relevant test is still as set forth in United States v. Rabinowitz, 339 U.S. 56, 66, that is, whether the search was reasonable.

The law is well settled concerning the right to search incident to an arrest. For example, this Court stated in Preston v. United States, 376 U.S. 364, 367, 11 L.Ed.2d 777, 84 S.Ct. 881 (1964) as follows:

"Unquestionably, when a person is lawfully arrested, the police have a right, without a search

warrant, to make a comtemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. [Citations.] This right to search and seize without a search warrant extends to things under the accused's immediate control, [citations], and, to an extent depending on the circumstances of the case, to the place where he is arrested [citations]."

The law is equally settled that an arrest without a warrant must be based upon probable cause. The test has been set forth in Ker v. California, 374 U.S. 23, 34-35, 10 L.Ed.2d 726, 83 S.Ct. 1623 (1963), as follows:

> "The lawfulness of the arrest without warrant, in turn, must be based upon probable cause which exists 'where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.' Brinegar v United States, 338 U S 160, 175, 176, 93 L ed 1879, 1890, 69 S Ct 1302 (1949), quoting from Carroll v United States, 267 U S 132, 162, 69 L ed 543, 555, 45 S Ct 280, 39 ALR 790 (1925); accord, People v Fischer, 49 Cal 2d 442, 317 P2d 967 (1957); Bompensiero v Superior Court of San Diego County, 44 Cal 2d 178, 281 P2d

250 (1955)."

Whether probable cause existed in the minds of the arresting officers must be determined in each case depending upon the particular facts and circumstances (Wong Sun v. United States, 371 U.S. 471, 479; and United States v. Law, 190 F.Supp. 100). When police officers act upon information received from an informer whose identity is unknown or undisclosed, probable cause for arrest may exist if such information has been sufficiently corroborated by other circumstance (Newcomb v. United States, 327 F.2d 649; and Bass v. United States, 326 F.2d 884). Among the circumstances which may be taken into account are the background of the suspect (State of Missouri ex rel. Ward v. Fidelity & Deposit Co. of Maryland, 179 F.2d 327) and his conduct when confronted by the officers (Brady v. United States, 148 F.2d 394; United States v. One 1951 Cadillac Coupe, 139 F.Supp. 475; and People v. Avila, 222 Cal.App.2d 83, 34 Cal.Rptr. 677).

We respectfully submit to the Court that the facts in this case, as fully set forth in this brief and in the opinion of the Court in People v. Cowling (unpublished) previously cited at length, establishes that the action of the police was at all times reasonable and in no way violated the appellee's constitutional rights.

The crux of the problem and the basis for the granting of the writ by the court below was the propriety of unannounced entry. The court held:

"As I read the cases, Ker v. State of California marks the outer limits of the doctrine of exigent circumstances (See: e.g., Travis v. United States, 362 F. 2d 477), and accordingly is controlling in the case at bar.

"In Ker the opinion for the Court noted:

> ' . . . Here justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police. We therefore hold that in the particular circumstances of this case the officers' method of entry, sanctioned by the law of California, was not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteeneth Amendment.' 374 U.S. at 40-41.

"Indeed the Supreme Court emphasized the existence in Ker of a well-founded fear on the part of the arresting officers that the defendant knew that arrest was imminent and might destroy the evidence of his crime by appending a footnote to the above quotation (See: 374 U.S. at 40, Note 12)."

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We do not disagree with this law. We do disagree with its application to this case.

But before going further, we believe it advisable to briefly sketch for the Court the pertinent California law to establish that it is not in conflict with federal law.

The most recent statement of that law by the California Supreme Court is found in People v. Gastello, 67 A.C. 596, 598-599, to wit:

> "In Maddox, we held that compliance with the substantially identical notice requirements of Penal Code section 844 for making arrests [1/] was excused, if the facts known to the officer before his entry were sufficient to support his good faith belief that compliance would have increased his peril or frustrated the arrest. Later cases have included the prevention of destruction of evidence as an additional ground for noncompliance with section 844. (People v. Covan (1960) 178 Cal.App. 2d 416 [2 Cal.Rptr. 811]; People v. Morris (1958) 157 Cal.App.2d 81 [320 P.2d 67]. Ker v. California (1963) 374 U.S. 23 [10 L.Ed.2d 726, 83 S.Ct. 1623] approved the principle of these cases under Fourth Amendment standards of reasonableness. The same principle supports similar exceptions to the

1/ "To make an arrest, . . . a peace-officer, may break open the door . . . of the house in which the person to be arrested is . . . after having demanded admittance and explained the purpose for which admittance is desired."

requirements of section 1531.

"The Attorney General contends that unannounced forcible entry to execute a search warrant is always reasonable in narcotics cases, on the ground that narcotics violators normally are on the alert to destroy the easily disposable evidence quickly at the first sign of an officer's presence.

"We do not agree with this contention. Neither this court nor the United States Supreme Court has held that unannounced forcible entries may be authorized by a blanket rule based on the type of crime or evidence involved . . . .

"In <u>Maddox</u>, the officers knocked, heard a male voice call 'wait a minute' followed by the sound of retreating footsteps, and only then forced entry. Similarly, in <u>People</u> v. <u>Carrillo</u> (1966) 64 Cal.2d 387 [50 Cal.Rptr. 185, 412 P.2d 377], entry followed a knock and observation of suspicious movements. In <u>People</u> v. <u>Smith</u> (1966) 63 Cal.2d 779 [48 Cal.Rptr. 382, 409 P.2d 222], and <u>People</u> v. <u>Gilbert</u> (1965) 63 Cal.2d 690 [47 Cal.Rptr. 909, 408 P.2d 365], the officers were in fresh pursuit of gun-wielding defendants. Similarly, in <u>People</u> v. <u>Hammond</u> (1960) 54 Cal. 2d 846 [9 Cal.Rptr. 233, 357 P.2d 289], officers had cause to believe defendant had a gun and was under the influence of heroin at the time of arrest.

"Thus we have excused compliance with the statute in accordance with established common law exceptions to the notice and demand requirements on the basis of the specific facts involved. No such basis exists for nullifying the statute in all narcotics cases, and, by logical extension, in all other cases involving easily disposable evidence. The statute does not contain the seeds of such far-reaching self-destruction.

"Under the Fourth Amendment, a specific showing must always be made to justify any kind of police action tending to disturb the security of the people in their homes. Unannounced forcible entry is in itself a serious disturbance of that security and cannot be justified on a blanket basis. Otherwise the constitutional test of reasonableness would turn only on practical expediency, and the amendment's primary safeguard--the requirement of particularity--would be lost. Just as the police must have sufficiently particular reason to enter at all, so must they have some particular reason to enter in the manner chosen. To the extent that People v. Manriquez (1965) 231 Cal. App.2d 725 [42 Cal.Rptr. 157], and People v. Samuels (1964) 229 Cal.App.2d 351 [40 Cal.Rptr. 290] are contrary to our conclusion herein, they are disapproved."

Two further California cases are uniquely applicable to this case. They are People v. Rucker, 197 Cal. App.2d 18, 17 Cal.Rptr. 98, and People v. Aguilar, 232 Cal.App.2d 173, 42 Cal.Rptr. 666, which sanctioned unannounced entry when the police had reasonable cause to believe, as here, that narcotics were being administered.

The leading federal case in this regard is Ker v. California, 374 U.S. 23, 10 L.Ed.2d 726, 83 S.Ct. 1623. Therein the Court held:

> "Assuming that the officers' entry by use of a key obtained from the manager is the legal equivalent of a 'breaking,' see Keiningham v. United States, 109 App DC 272, 276, 287 F2d 126, 130 (1960), it has been recognized from the early common law that such breaking is permissible in executing an arrest under certain circumstances. See Wilgus, Arrest Without a Warrant, 22 Mich L Rev 541, 798, 800-806 (1924). . . .
>
> "Finally, the basis of the judicial exception to the California statute, as expressed by Justice Traynor in People v. Maddox, supra (46 Cal 2d at 306), effectively answers the petitioner's contention:
>
>> "'It must be borne in mind that the primary purpose of the constitutional guarantees is to prevent unreasonable

invasions of the security of the people in their persons, houses, papers, and effects, and when an officer has reasonable cause to enter a dwelling to make an arrest and as an incident to that arrest is authorized to make a reasonable search, his entry and his search are not unreasonable. Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with section 844. Moreover, since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose. (Read v. Case, 4 Conn. 166, 170 [10 Am. Dec. 110]; see Rest.Torts, § 206, com. d.) Without the benefit of hindsight and ordinarily on the spurt of the moment, the officer must decide these questions in the first instance.

"No such exigent circumstances as would

authorize noncompliance with the California statute were argued in Miller, and the Court expressly refrained from discussing the question, citing the Maddox Case without disapproval. 357 US, at 309. Here justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police. We therefore hold that in the particular circumstances of this case the officers' method of entry, sanctioned by the law of California, was not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment."

We submit that the facts in this case established "such exigent circumstances as would authorize noncompliance."

Here, as in Ker, the police officer was well experienced in narcotic enforcement and, as in Ker, testified that it was common for addicts or suspects to try to destroy narcotics when the believed they were going to be arrested (RT 95).

Here, as in Ker, there was furtive conduct which

was grounds for the police believing that entry would be denied and the narcotics destroyed. During the period of the police surveillance of the residence two women entered and left it (RT 55). At the time they knocked to gain entry the police observed the curtain upstairs move (RT 67). When co-defendant Reece attempted to gain entry he stepped back from the door (RT 70). Again there was observation of him from the second story window of the suspect house before he was allowed to enter (RT 23-24).

Contrast this admission of three people with what transpired when the landlord, at the request of the police, sought entry. When he knocked he was observed as the others were. But, unlike the others, his first two visits were greeted with silence, his third with the request to return later (RT 27-29, 68).

These facts establish a pattern of checks by the occupants and resulting denial of entry on a selected basis. Certainly it would lead the police to believe they would be denied entry.

The physical arrangement of the residence must also be considered. The suspect room was a bedroom on the second floor which had a fire escape at its back window. A bathroom was also located on that floor. Such a physical arrangement would render an announced delayed entry a farce, for in the interim the narcotics could easily be destroyed. Indeed, the facts show that even under the circumstances

there was an attempt to dispose of narcotic equipment and good reason to believe there was an actual disposal of some of the narcotics (RT 181-183).

Certainly these facts make this case at least as strong as others where unannounced entries have been sanctioned. But, there is more. Appellee was arrested almost immediately after departing from the residence. At that time he had hypodermic marks on both arms and appeared to be under the influence of narcotics (RT 26, 31, 41, 81). Several of the hypodermic marks appeared to be recent (RT 86). This, plus the other information possessed by the police, would reasonably lead them to believe that narcotics were then being administered in the residence. Under Rucker and Aguilar, this would be considered exigent circumstances.

When all of the facts known to the police are considered as a whole, the conclusion is inescapable that not only was their conduct reasonable, it was commendable.

CONCLUSION

It is respectfully requested that the judgment of the United States District Court for the Eastern District be reversed.

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

____
Deputy Attorney General